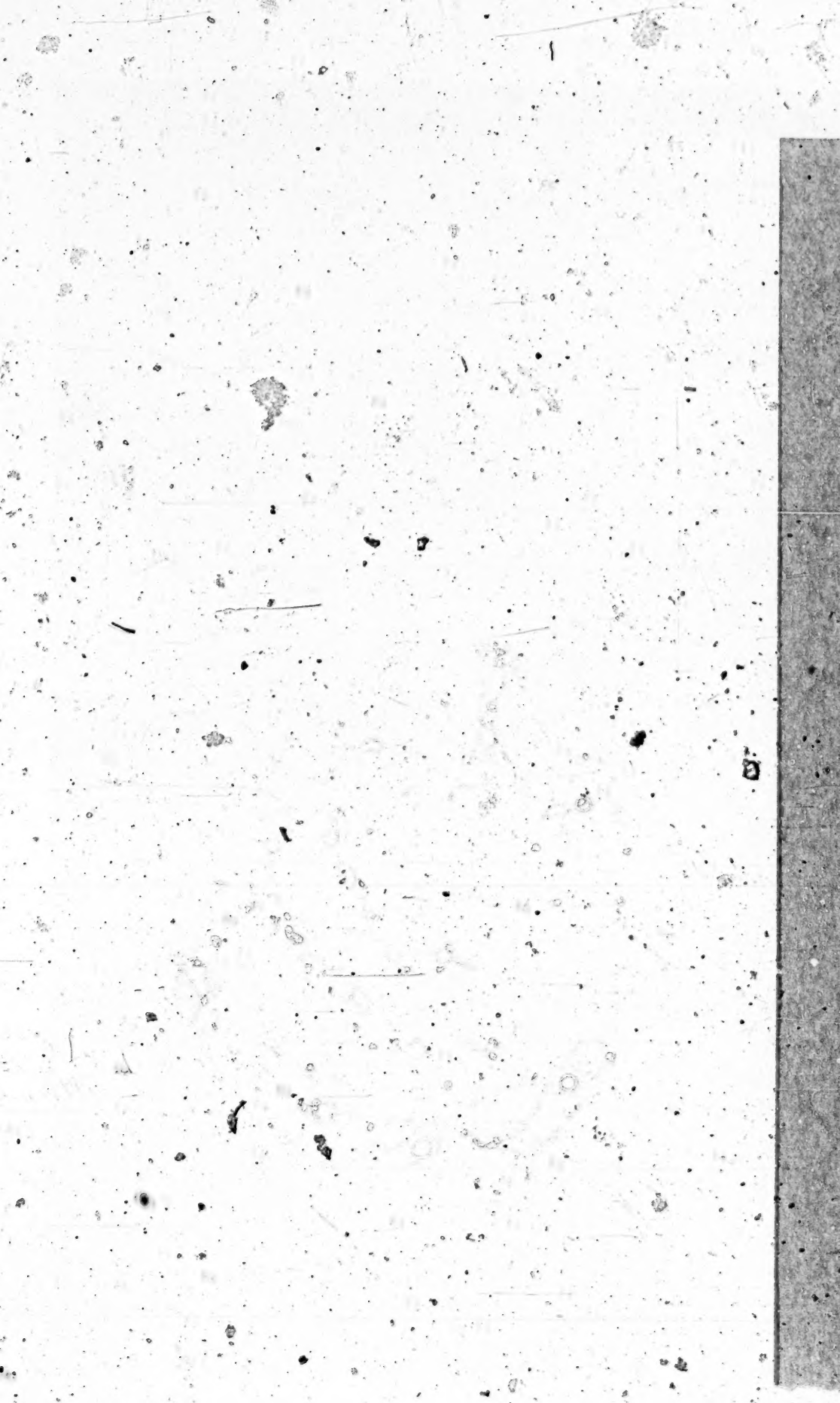

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No. 35

In the Supreme Court of the United States

OCTOBER TERM, 1951

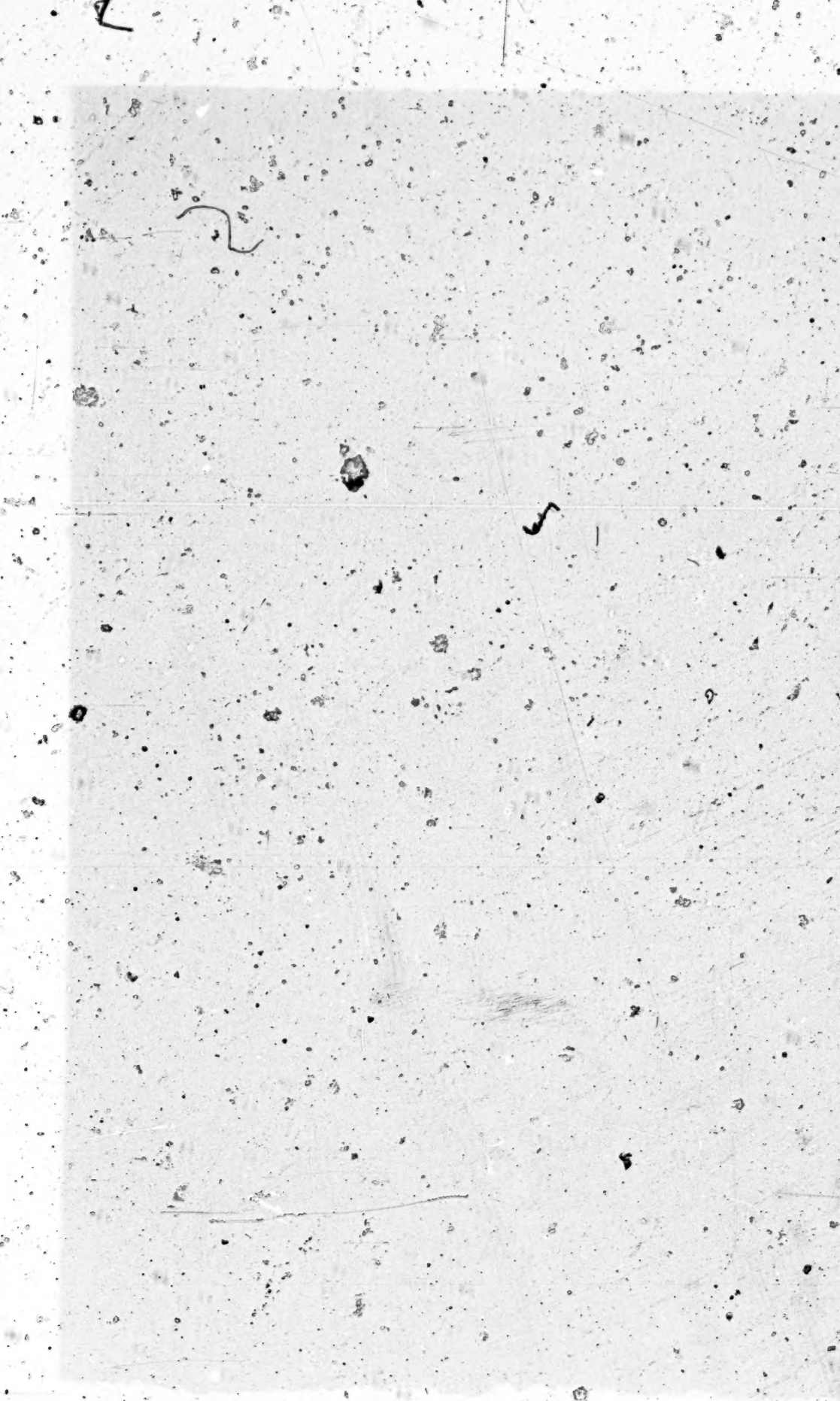
FRANK CARLSON, MIRIAM CHRISTINE STEVENSON, DAVID HYUN, AND HARRY CARLISLE, PETITIONERS

v.

HERMAN R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT



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OPINIONS BELOW

The opinion of the Court of Appeals (R. 331–350) is reported at 187 F. 2d 991. The findings of fact and conclusions of law of the District Court appear at pages 60, 103, 140, and 172 of the record.

JURISDICTION

The judgments of the Court of Appeals were entered on March 13, 1951 (R. 350, 351, 352). The petition for a writ of certiorari was filed on April 28, 1951, and was granted on October 8, 1951 (R. 353). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the detention of the petitioners without bail pending the determination of their deportability was authorized by Section 20 (a) of the Immigration Act as amended by Section 23 (a) of the Internal Security Act of 1950.

2. Whether the detention of the petitioners violated their rights under the Eighth or the Fifth Amendment.

STATUTE INVOLVED

Section 20 (a) of the Immigration Act of February 5, 1917 (39 Stat. 890, 54 Stat. 1238, 57 Stat. 553) as amended by Section 23 of the Internal Security Act of 1950 (64 Stat. 1010), provides in pertinent part as follows:

> * * * Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for

deportation if an order for his deportation has been made. * * * [8 U. S. C., Supp. IV, Sec. 156 (a).]

STATEMENT

All of petitioners are aliens who, prior to the passage of the Internal Security Act of 1950, had been arrested on warrants of deportation and enlarged on bail pending the determination of their deportability. In each case, the warrant charged that the alien, after entry, was a member of an organization which advocated and taught the overthrow by force or violence of the Government of the United States (R. 45, 94–95, 135, 165), and that each was therefore deportable under the Act of October 16, 1918, as amended (8 U. S. C. 137). Hearings were initiated under these warrants, but (except in the case of Carlisle) were discontinued by the Government and hearings *de novo* ordered as a result of the decision by this Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (R. 61, 104, 141).

On September 26, 1950, shortly after the effective date of the Internal Security Act of 1950, the Acting Commissioner of Immigration and Naturalization, in Washington, D. C., requested the District Director in Los Angeles, California, to submit a report covering all aliens in the Los Angeles district who were currently active members of the Communist Party and who were under deportation proceedings (R. 61, 104, 141,

172). On October 6, 1950, the District Director submitted to the Acting Commissioner a report containing summaries of facts taken from the confidential records of the Government at Los Angeles in the cases of eleven aliens, among whom were included the petitioners, who were currently active in, and of eight aliens who were past members of, the Communist Party (R. 41, 90, 131, 161). On October 21, 1950, the Acting Commissioner directed by radiogram that Hyun, Carlson and Carlisle be rearrested and detained pending determination of their deportability pursuant to Section 20 of the Immigration Act of 1917, as amended by Section 23 of the Internal Security Act of 1950, *supra* (R. 42, 131, 161–162). The radiogram also directed that the other active Communist aliens under proceedings be arrested and detained,[1] on which authority petitioner Stevenson was rearrested (R. 91).

On October 31, 1950, new warrants of deportation were issued based on the ground that petitioners, after entry, were members of the Communist Party of the United States (R. 12, 81, 127, 168).[2] Hearings were promptly instituted

[1] In the order to detain active Communist aliens, other than the three specifically named, the Acting Commissioner permitted the district director to take into consideration hardship to the aliens because of health or special family situation in determining whether to detain them.

[2] Section 22 of the Internal Security Act of 1950 had added to the classes of deportable aliens "(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States * * * (iv) the Communist or other to-

under these warrants and efforts made by the Government to expedite them. Except in the case of Hyun, delays in the hearings were caused by action of petitioners' counsel (R. 303–315). These hearings have been completed and orders of deportation have been entered against each of petitioners, with the exception of Carlisle, against whom an order of deportation has been prepared, but has not yet been signed and entered.[3] Appeals are now pending in each case before the Board of Immigration Appeals.[4]

Petitioners sought release on bail by means of petitions for writs of habeas corpus filed in the District Court for the Southern District of California on November 2 and 3, 1950, which attacked the validity of the Attorney General's action in detaining them. It was alleged in each case that the petitioner had lived within the jurisdiction of the United States for an extended period of time; that he had engaged in a lawful occupation and had always behaved in a law-abiding manner; that he had strong family ties in this country; and when previously free on bond he had reported for hearings as required and had at all times made

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talitarian party of any State of the United States * * *" (8 U. S. C., Supp. IV, 137).

[3] The dates of these orders of deportation are as follows: Carlson (March 29, 1951); Hyun (August 1, 1951); Stevenson (August 1, 1951).

[4] In the case of Carlson, the appeal has already been heard by the Board of Immigration Appeals, but no decision has yet been announced.

himself available (R. 1, 68, 114, 151). The petition, in each case, contended that the Attorney General's action in confining the petitioner without bail was an abuse of the discretionary power of the Attorney General (R. 5, 73, 122, 156), a denial of due process in violation of the Fifth Amendment to the Constitution (R. 7, 75, 122, 157), and a denial of bail in violation of the Eighth Amendment (R. 7, 75, 157).

The Director's return to the order to show cause stated the reason for the denial of bail in each case to be "that there is reasonable cause to believe that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States" (R. 11, 79, 125).

The district court held that the action of the Attorney General in denying bail was reviewable (R. 20), but that the burden was upon the petitioners to show that the Attorney General had been unreasonable and had abused his discretionary power. Since the petitioners offered no evidence to this effect, the district court held there had been no abuse of discretion and dismissed the proceedings (R. 23, 24). 94 F. Supp. 18.

On appeal, the court of appeals reversed and remanded on the ground that the Director's return was insufficient in that it had not mentioned any facts upon which a determination could be

made that the Attorney General had acted on reasonable grounds (R. 35, 28–37). 186 F. 2d 183.

At the second hearing, the Director filed new returns in which he alleged that each of the petitioners had, after entry, been a member of the Communist Party of the United States (R. 43, 93, 133, 164). To these returns the Director appended affidavits verifying petitioners' active leadership in the Communist Party program (R. 45, 95, 136, 166). The facts so presented may be summarized as follows:

(*a*) Carlson was editor of the "Young Worker," official organ of the Young Communist League of the United States; he was a member of the National Executive Committee of the Young Communist League; he was Secretary and President of the Young Communist League of California; during the latter part of 1946 until about the summer of 1947, he was State Secretary of the Communist Party of the United States for the State of Wisconsin; and in September 1949 he headed the Marxist Institute in Los Angeles (R. 51–52).

(*b*) Stevenson was a Unit Organizer and a member of the Hollywood Subsection Committee of the Communist Party in 1936; she was secretary of a Communist Party Unit in 1938; and she was a correspondent of the People's Educational Center in 1948 (an organization designated by the Attorney General as Communist, F. R. 315, No. 231) (R. 95).

(*c*) Hyun was instrumental in reactivating the Communist Party in Hawaii in 1945; he was a member of the Executive Board of the Communist Party in Hawaii in 1946; he led and participated in discussion groups on indoctrination of Communist philosophy, planning; strategy, and recruitment of members in the Communist Party during the years 1946 and 1947; he was instrumental in forming a Branch of the Hawaiian Civil Liberties Committee on the West Coast soon after his arrival in California from Hawaii in 1947 (an organization designated by the Attorney General as Communist, F. R. 315, No. 231); and he was educational director of the West Lake Section of the Communist Party in Los Angeles, California, in 1949 (R. 136).

(*d*) Carlisle was a speaker at closed meetings of Communist Party functionaries in 1933; in 1935 he was editor of the "Western Worker" (the then official Western organ of the Communist Party, U. S. A. Section of the Communist International); in 1949 he was active in the affairs of the American-Russian Institute and was on its list of approved speakers (said organization has been designated by the Attorney General as Communist, F. R. 315, No. 231) (R. 166).

The district court held that this was a sufficient showing under the decision of the court of appeals, and on the failure of petitioners to offer any

evidence to the contrary, the court dismissed the proceedings (R. 64–65, 106, 143, 174–175). The court of appeals affirmed, stating that in the light of the findings of Congress expressed in the Internal Security Act of 1950 and the incontrovertible "world-wide conspiracy against free democratic governments by a major world power using as its vehicle the establishment of Communism by force and violence," the return and affidavits were sufficient to show that the Attorney General had not abused his discretionary power in refusing to enlarge the petitioners on bail pending the determination of their deportability (R. 339, 331–350). 187 F. 2d 991.

SUMMARY OF ARGUMENT

I

Congress intended that the Attorney General should give weight to the nature and extent of an alien's Communist activity in determining whether to detain him during the pendency of deportation proceedings. We respectfully refer this Court to our brief in *Butterfield* v. *Zydok*, No. 136, this Term, for a review of the legislative history supporting this point. Petitioners' argument to the contrary ignores the entire history of the Internal Security Act of 1950.

The decision to detain these specific aliens was the result of an application by the Commissioner of Immigration of the congressional intent to the particular facts of the individual cases. There

was no abuse of discretion, since the facts as to each petitioner form an appropriate basis for a determination that detention was in each case necessary.

II

The constitutional argument made in our brief in *Butterfield* v. *Zydok* is equally applicable to this case. Our argument here, as there, is that neither the Eighth nor the Fifth Amendment prevented Congress from delegating to the Attorney General authority to detain aliens pending deportation proceedings in such cases as these. The petitioners' argument that detention is in violation of the Eighth Amendment ignores both the provisions of the Amendment and the fact that these are not criminal proceedings. Their argument that either the statute or the action of the Attorney General deprived petitioners of liberty without due process in violation of the Fifth Amendment finds no support in the facts of these cases.

ARGUMENT

I. THE DETENTION OF THE PETITIONERS WITHOUT BOND WAS, IN THE CIRCUMSTANCES OF THESE CASES, WITHIN THE DISCRETION GRANTED THE ATTORNEY GENERAL

A. *Congress gave the Attorney General broad discretionary power to detain aliens pending deportation, intending that the factor of Communist activity be given great weight*

We respectfully refer the Court to pages 11 to 25 of our brief recently filed in *Butterfield* v.

Zydok, No. 136, this Term, where it is demonstrated that Congress intended the Attorney General to take into consideration the nature and extent of an alien's Communist activities in determining whether the national welfare requires that he be detained during the pendency of deportation proceedings.

The only real attack which the petitioners make on this proposition is at pages 18 to 21 of their brief. Here they appear to argue that since deportation proceedings have some of the attributes of criminal trials, the criminal cases holding that the future availability of the defendant is the only factor to be considered in fixing bail are applicable to deportation proceedings. This argument is faulty in several respects: First, the criminal cases involve not general principles, but the construction of statutes or rules which by their terms apply to criminal cases only. (E. g. 46 (c) F. R. Crim. P.) Second, although it is true that a deportation proceeding in some respects has attributes similar to a criminal trial, it is equally true that in others the proceedings are very different. Thus, it is well established that deportation procedings may be carried on before officers of the executive branch of the Government, rather than in the courts, and that an alien is not entitled to trial by jury. *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *Zakonaite* v. *Wolf*, 226 U. S. 272; *Bilokumsky* v. *Tod*, 263 U. S. 149. Third, and even more sig-

nificantly, petitioners choose to ignore the wealth of legislative history which shows that Congress intended the Attorney General to take into consideration security factors in determining whether to grant bail pending the determination of an alien's deportability. Specifically, we refer the Court to pages 20 to 25 of our brief in *Butterfield* v. *Zydok*.

Even under prior law, the Court of Appeals for the Second Circuit interpreted the bail provision in the Immigration Act as requiring the Attorney General to consider, among other factors, national security (*United States ex rel. Potash* v. *District Director*, 169 F. 2d 747, 751, see p. 16 of our brief in *Butterfield* v. *Zydok*). Congress had this interpretation before it when it amended the Immigration Act of 1917 by the Internal Security Act of 1950 to give the Attorney General the express authority to retain an alien in custody. Statements by members of the Judiciary Committee which reported out the amendment make it clear that Congress wanted to clarify the law to conform to the decision in the *Potash* case. The sponsors of the legislation explained to Congress the necessity of detaining aliens pending deportation (96 Cong. Rec. 10449–10450, 10453). And finally, to clinch the matter Congress wrote into section 2 of the bill as paragraph 13, the following statement (50 U. S. C., Supp. IV, Sec. 781 (13)):

> (13) There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

We submit that the Attorney General has not misinterpreted the intention of Congress.

B. *The orders that the petitioners be detained in custody were well within the discretionary authority granted by Congress*

The record demonstrates that the determination to detain these specific aliens without bail was a reasonable exercise of discretion in the light of the circumstances surrounding the cases.

In order to determine which of the aliens against whom deportation proceedings were pending at the time of the passage of the Internal Security Act of 1950 constituted a danger to national security because of their Communist activities, the Acting Commissioner of Immigration and Naturalization, on September 26, 1950, directed the District Directors to supply him with a report on each of those aliens within his district (R. 41). On October 6, 1950, the District Director in Los Angeles forwarded to the Acting Commissioner a list of 19 names of active and past members of the Communist Party and a report on each of the persons named, setting forth facts taken from the records of the Los Angeles office. Each of the petitioners was named and his activities described

in this report. (R. 41, 90–91, 131, 161–162.) At the time of these reports, hearings had been begun in the case of each petitioner, but (except in the case of Carlisle) had been discontinued because of the decision in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33. Two weeks later, on October 21, 1950, the Acting Commissioner specifically directed the rearrest of Hyun, Carlisle, and Carlson, with instructions that they be detained pending the determination of their deportability. The District Director was also instructed to arrest all the other active Communist aliens, but to detain them only if they could be held without hardship to their health or families. It was under this direction that Stevenson was arrested and detained. The factors on which the Acting Commissioner relied were expressed by him in the radiogram sent to the District Director on October 27, 1950. This radiogram read as follows (R. 42, 91, 132, 162):

> For your information and that of United States Attorneys and aliens and their Attorneys the instruction to you of October Twenty First to take into custody and detain the alien Communists was issued only after the cases had been examined in the light of the Internal Security Act of Nineteen Fifty and the spirit and intention thereof and all of the factors concerning the likelihood of the deportability and the activities of said alien had been given careful consideration as well as the factors of undue hardship which continued deten-

tion might impose Stop As you have already been instructed the hearings and steps towards disposition of these cases are to be given top priority Stop Also as you have been advised these aliens were ordered detained by authority of the Attorney General delegated to me by Section Nine Zero Point One of Title Eight CFR Paren Twelve FR Five Zero Seven Two July Thirty One Nineteen Forty Seven Paren under Section Thirty Seven of the Alien Registration Act of Nineteen Forty Comma Eight USC Four Five Eight.

The District Director, in his returns to the writs of habeas corpus, revealed the specific circumstances with respect to each of the petitioners which led to the decision to detain them (R. 52, 95, 136, 166). These circumstances are outlined *supra*, at pages 7, 8. It is noteworthy that in traversing these returns none of these petitioners took issue with any of the factual statements contained therein (R. 49, 98, 138, 169).

It thus appears that as of the time the petitions for habeas corpus were filed, the detention of the petitioners was supported by a reasonable ground to believe that each of them was, or recently had been, engaged as a leader in certain specific Communist activities. As of the present time, there is an even stronger ground for detaining three of them, since orders of deportation have actually been issued against Carlson, Hyun, and Stevenson (see p. 5, *supra*). Therefore, if the peti-

tioners' analogy to criminal proceedings were followed, the case would now be analogous to a defendant seeking bail after conviction rather than before trial.[5]

There can be no doubt that in each of these cases, therefore, the Attorney General had ample reason to connect each alien individually with specific Communist activity. Although there was no evidence in the particular cases as to the danger to national security from the Communist program, it is submitted that it would be unreasonable and unnecessary to have to reestablish in each individual case the facts with respect to the aims and objectives of the Communist Party in this country. Rather, it was entirely proper to take into account the information which had been presented as evidence in the *Dennis* case as to the activities of the Communist Party, which evidence was found by the Court of Appeals for the Second Circuit to be sufficient to sustain a conviction under the Smith Act (54 Stat. 671, Secs. 2, 3, 18 U. S. C. 10, 11).[6] Moreover, the Attorney

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[5] It is settled that there is no absolute right to bail after conviction. Rule 46 of the F. R. Crim. P. permits bail after conviction only where there is a substantial question in favor of defendant, and even in such cases bail remains within the discretion of the court. *Williamson* v. *United States*, 184 F. 2d 280 (C. A. 2).

[6] *Dennis* v. *United States*, 183 F. 2d 201 (C. A. 2). This Court restricted certiorari to exclude consideration of this issue. *Dennis* v. *United States*, 340 U. S. 863. However, the Court's determination in that case (*Dennis* v. *United States*,

General would have been derelict in his duty had he neglected entirely the congressional findings as to the danger to the nation from Communist activities.

In these cases, the action of the Attorney General must be sharply distinguished from the situation, as viewed by this Court, in *Stack* v. *Boyle*, decided by this Court on November 5, 1951:

> * * * The Government asks the courts to depart from the norm by assuming, without the introduction of evidence, that each petitioner is a pawn in a conspiracy and will, in obedience to a superior, flee the jurisdiction. To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act. Such conduct would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute under which petitioners have been indicted.

Petitioners' argument might lead to the assumption that a similar blanket approach was used in this case. However, the above analysis of the sequence of events shows that such an assumption is false, and that, consistently with the standards enunciated in the *Stack* case, the Attorney Gen-

341 U. S. 494) that the conviction did not involve an infringement of the First Amendment serves to answer petitioners' offhand attempt to invoke the First Amendment as a basis for claiming illegality of detention in this case. (See Pet. 29–31.)

eral carried out his function by applying the policy fixed by Congress to the facts in the case of each petitioner.

II. THERE IS NO CONSTITUTIONAL IMPEDIMENT TO DETENTION OF PETITIONERS PENDING THEIR DEPORTATION

The arguments on constitutionality are set forth in our brief in *Butterfield* v. *Zydok,* at pp. 28–41, and little need be added in order to meet the contentions made by the petitioners.

Their argument with respect to the application of the Eighth Amendment is somewhat difficult to follow. It appears to be that if Congress intended to delegate to the Attorney General authority to refuse bail on the ground that an alien's activity constituted a security risk, such a standard violates the Eighth Amendment. This argument is not supported by the language of the Eighth Amendment, which simply forbids the exaction of "excessive bail." Moreover, as we point out in our brief in *Butterfield* v. *Zydok,* pp. 30–31, the Eighth Amendment has been held to apply only to criminal proceedings.

With respect to deportation proceedings, it has always been held that aliens have no absolute right to bail (*Wong Wing* v. *United States,* 163 U. S. 228), and the early statutes gave them no such right. It would seem clear then that when Congress decided to grant bail as a matter of grace, it was well within its power to make the

grant dependent upon the discretion of the Attorney General. The legislative history shows that Congress intended the national safety to be a prime element in the exercise of that discretion. Certainly that is not an unreasonable standard.

Petitioners also appear to make the argument that Congress denied aliens due process of law under the Fifth Amendment by making it mandatory on the Attorney General to deny bail to alien communists (Pet. Br. p. 13). We need not consider the constitutionality of such a law for that is not what the present law provides, and that is not the way the Attorney General has construed it. Representative Walter, Chairman of the Judiciary Committee of the House, in commenting on the provision as it appeared in the Hobbs bill before its incorporation into the final act, specifically stated (96 Cong. Rec. 10449-10450):

> * * * No particular hardship is going to be worked on anyone because, bear this fact in mind, *it is not mandatory on the Attorney General to hold people in detention. He is given discretionary power.* If in his judgment one of the class of people I have just mentioned ought to be held for paramount national reasons, he may detain him, but he is not obliged to hold anybody, *although I trust that in every case of a subversive or a hardened criminal he will.* [Emphasis supplied.]

And the act itself, by its terms, leaves no doubt that the power to detain is discretionary, not mandatory.

If, on the other hand, this argument is intended to mean that Congress had no power to guide the Attorney General in the exercise of his discretion by selecting a certain class of aliens for special consideration, that argument runs directly contrary to the history of all the legislation with respect to bail, both in this country and in England. From the time of our first legislation on the subject, Congress has always set aside the class of defendants charged with crimes that subject them to capital punishment for the special exercise of discretion on bail. The same has been true in England. (See our brief in *Butterfield* v. *Zydok*, pp. 33–36.

CONCLUSION

For the foregoing reasons, it is respectively submitted that the judgment of the court below should be upheld.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
JOHN F. DAVIS,
Special Assistant to the Attorney General.
BEATRICE ROSENBERG,
SAMUEL DASH,
Attorneys.

NOVEMBER 1951.

U. S. GOVERNMENT PRINTING OFFICE: 1951